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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1982

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VINCENT ZUCKERMAN,

*Petitioner,*

*v.*

UNITED STATES OF AMERICA,

*Respondent.*

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## PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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## QUESTIONS PRESENTED FOR REVIEW

Even assuming an intent on the part of the purchaser not to pay for merchandise received on credit, do the mailings of invoices from the seller to the purchaser satisfy the "in furtherance" requirement of the federal mail fraud statute?

## LIST OF PARTIES

All parties appear in the caption of the case.

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Petitioner, VINCENT ZUCKERMAN, prays that a writ of certiorari be issued to review the judgment of the United States Court of Appeals for the Seventh Circuit.

## CITATIONS TO OPINION BELOW

There are no reported decisions below. The opinion of the Seventh Circuit Court of Appeals affirming the jury's verdict in the District Court is attached as Exhibit A.

## JURISDICTIONAL BASIS

Judgment was entered against the petitioner on April 14, 1981. The Seventh Circuit affirmed that judgment on January 15, 1982. A petition for rehearing en banc was denied on May 26, 1982. Petitioner seeks a writ of certiorari pursuant to 28 U.S.C. § 1254(1) and Rule 22.2 of the Rules of this Court.

## STATUTES INVOLVED

18 U.S.C. § 1341:

> Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, or to sell, dispose of, loan, exchange, alter, give away, distribute, supply, or furnish or procure for unlawful use any counterfeit or spurious coin, obligation, security, or other article, or anything represented to be or intimated or held out to be such counterfeit or spurious article, for the purpose of executing such scheme or artifice or attempting so to do, places in any post office or authorized depository for mail matter, any matter or thing whatever to be sent or delivered by the Postal Service, or takes or receives therefrom, any such matter or thing, or knowingly causes to be delivered by mail according to the direction thereon, or at the place at which it is directed to be delivered by the person to whom it is addressed, any such matter or thing, shall be fined not more than $1,000 or imprisoned not more than five years, or both.

## STATEMENT OF THE CASE

The government charged Vincent Zuckerman in a five count indictment alleging violations of the mail fraud statute, 18 U.S.C. § 1341. The government charged that Zuckerman had devised a scheme whereby he ordered television sets and video cassette recorders from Zenith Distributing Company, not intending to pay for the merchandise. According to the government, Zuckerman placed five orders for merchandise. Each time, Zenith shipped the merchandise to Zuckerman by truck on the day ordered, and on the next day mailed an invoice to Zuckerman for the balance due. Zenith's billing policy enabled Zuckerman to make the last four orders before the first invoice fell due. The five invoices mailed by Zenith formed the basis for the mail fraud indictment, and the jury returned verdicts of guilty on each count.

On appeal to the Seventh Circuit, Zuckerman argued that the mailings of the invoices did not sufficiently further the alleged fraudulent scheme to constitute mail fraud. The appellate court rejected this argument, with Judge Fairchild, former Chief Judge of the Seventh Circuit, dissenting. Noting that Zuckerman appeared aware that payment would not fall due for 30 to 45 days from the date of shipment, the two majority judges found the mailings of the invoices to be "necessary to the successful outcome of [the] scheme," and "the primary feature of the billing system which Zuckerman sought to take advantage of in order to succeed in his plan to defraud Zenith." Memorandum op. at 6. As Zuckerman arguably could have paid for the merchandise upon receipt, the panel concluded that Zuckerman "triggered the mailings," because he did not request Zenith to send the merchandise C.O.D. The Court held that the mailings, therefore, "created the time frame for the fraud." *Id.*

Voting for reversal in a dissenting opinion, Judge Fairchild reasoned that

> The mailing of invoices was an ordinary feature of Zenith's sales on credit, and certainly resulted from his activity. But that particular feature provided no advantage to the defendant. The mailings did not grant or induce the victim to grant the defendant credit. They did not extend the due date, delay discovery, or render the extension of credit more exposed to fraudulent exploitation. At most they triggered the count down toward the expiration of the credit period.

Memorandum op. at 11. Judge Fairchild therefore concluded that the mailings did not sufficiently further the alleged fraudulent scheme to constitute mail fraud.

## REASONS FOR GRANTING THE WRIT

### EVEN ASSUMING AN INTENT ON THE PART OF THE PURCHASER NOT TO PAY FOR MERCHANDISE RECEIVED ON CREDIT, THE MAILINGS OF INVOICES FROM THE SELLER TO THE PURCHASER DO NOT SATISFY THE "IN FURTHERANCE" REQUIREMENT OF THE FEDERAL MAIL FRAUD STATUTE.

Essentially, this case raises the question of whether invoices mailed by a seller to a purchaser pursuant to a credit transaction are sufficient to bring that transaction within the scope of the federal mail fraud statute. The Seventh Circuit Court of Appeals' decision here, answering that question in the affirmative, potentially makes nearly every credit transaction subject to prosecution for mail fraud in federal court. That position by the Seventh Circuit requires review for three compelling reasons. First, the Seventh Circuit invests the mail fraud statute with a broad scope clearly not envisioned by Congress. Second, the decision by the Seventh Circuit contradicts *United States* v. *Maze*, 414 U.S. 395 (1974), which is this Court's major statement on the scope of the mail fraud statute. Finally, the decision has created a split in the federal circuits, with the Fourth and Fifth Circuits deciding similar issues in an opposite manner.

## A.

### The Seventh Circuit Erroneously Interpreted the Mail Fraud Statute to Include any Case Where a Purchaser Fails to Pay for Goods or Services Received on Credit.

The Seventh Circuit's decision injects unparalleled breadth into the mail fraud statute, creating a federal crime in nearly every instance where a purchaser fails to pay for goods or services received on credit. As this is the first case in the federal courts to confront directly the role of mail fraud in the context of an ordinary credit transaction, petitioner respectfully asks that this Court grant a writ of certiorari so that the broad view of the Seventh Circuit can be reviewed and ultimately rejected.

The government charged that Vincent Zuckerman ordered goods from Zenith over the telephone, knowing that he would not have to pay for the goods for thirty to forty-five days. In each instance, Zenith immediately shipped to Zuckerman the ordered merchandise by truck, and mailed him an invoice the next day. It has been Zuckerman's contention that these mailings did not further his alleged scheme, and therefore they were not "sufficiently closely related" to the scheme to constitute mail fraud. Zuckerman apparently knew about Zenith's credit policy prior to ordering the merchandise; this knowledge enabled him to order the merchandise from Zenith knowing that the payment would not immediately fall due. But any credit customer of Zenith would have a prescribed time to pay, and the customer would have this prescribed time regardless of whether Zenith mailed out invoices for the merchandise purchased. Thus, Zenith's credit policy existed entirely independent from whether invoices were mailed or not. The Seventh Circuit turned the situation upside down by concluding that the mailings "triggered" the credit policy; if anything, it was the credit policy that triggered the mailings.

The repercussions from this decision would be enormous. By holding the mailings sufficiently closely related to the

scheme, the Seventh Circuit would find a case of mail fraud in every credit transaction where the buyer intentionally fails to pay. Every credit transaction involves delay, and every credit transaction precipitates mailings, either for the total amount due or for the amount yet unpaid. As a result, the Seventh Circuit has offered the mail fraud statute as a remedy for every merchant or seller who has customers who have not paid their bills. Indeed, the federal court would now provide a more attractive forum for bill collectors than the state court: the creditor need not employ a private attorney and the creditor may achieve not merely an order for "restitution" and hence repayment, but he or she would also gain the undeniable and often understandable satisfaction of seeing his or her debtor convicted and perhaps confined to jail for their failure to make payment. In short, the decision turns the federal government into a collection agency without parallel for unsatisfied creditors.

A few examples illustrate the potential reach of the Seventh Circuit's interpretation of the mail fraud statute. If an individual charges for merchandise at a department store, or enters into any kind of purchase agreement that involves possession of merchandise while full payment remains outstanding, an intentional failure to pay would be mail fraud. If, according to this decision, Zuckerman "triggered the mailings" by ordering the merchandise while knowing "that a mailed invoice would not be due" for a certain period of time, then so would the retail customer have triggered the mailing knowing that the mailed invoice from the department store would not immediately be due when he or she obtained the merchandise on credit. If the court's analysis on "triggering" the mails is the standard, then the simplest retail credit transaction, such as the one described above, would potentially fall under the purview of the federal mail fraud statute.

Similarly, if an attorney agrees to go to court for a client, and the attorney subsequently mails the client a bill, in the

Seventh Circuit the client has committed mail fraud if he or she thereafter intentionally fails to make payment. Should the client pay half the bill before the attorney goes to court, inducing the attorney to later mail a bill for the balance, the client's subsequent intentional failure to remit the balance would be mail fraud. Just as in this case, the client could be said to have triggered the mailing when he or she did not pay cash up front but relied on the attorney's policy to perform a service and bill later.

The problem with this analysis is that it considers the mailing itself as stimulating the credit policy. Thus, in the attorney-client example above, the Seventh Circuit, to be consistent, would have to say that the mail fraud arose when the attorney mailed the bill, because mailing the bill triggered the credit policy. Of course, the mailing of the bill did not trigger the credit policy—the credit policy existed whether the bill was mailed or not. What made the client's hypothetical scheme possible was not a credit policy triggered by a mailed invoice, but a credit policy triggered by the attorney's decision to go to court in the absence of full payment. Likewise, in the department store example, the store's credit policy would not be triggered by the mailed invoices, but by the store's initial decision to give the customer merchandise while the bill remained unpaid. Zuckerman's case is no different: Zenith's mailed invoice did not set the credit policy in motion; rather, the credit policy was triggered by Zenith's initial decision to ship the merchandise after receiving the order over the telephone.

Congress clearly did not intend to pass a statute that would make a federal crime of nearly every credit transaction where an outstanding bill exists. Instead, it sought to limit mail fraud to those cases where people exploit our postal system as a step towards receiving the fruit of a criminal venture. *United States* v. *Stasczuk*, 502 F. 2d 875, 880 (7th Cir. 1974). The mail fraud statute simply does not reach all frauds: it reaches only

those limited instances where the mail use actually furthers the scheme's execution. *Parr* v. *United States*, 363 U. S. 370, 389-90 (1960); *Kann* v. *United States*, 323 U. S. 88, 95 (1974). In Zuckerman's case, as in the department store and attorney-client examples above, the mails played no role in the execution of the scheme. The alleged schemers obtained the fruits of their alleged schemes when the merchandise or service was delivered or completed and the later mailings did not alter that fact or aid the scheme or hide it from detection. The credit policies in each case existed regardless of whether the invoices were later mailed. As described by the dissenting judge below, the mailings at most "triggered the count down toward expiration of the credit period." Other than that, however, the mailings played no role in the credit policy.

Thus a failure to pay pursuant to an ordinary credit transaction does fall under the ambit of the mail fraud statute. Petitioner therefore respectfully requests that this Court issue a writ of certiorari so that the proper reach of the statute can be settled with finality.

**B.**

**The Seventh Circuit's Decision Contradicts the Leading United States Supreme Court Decision on Mail Fraud.**

*United States* v. *Maze*, 414 U. S. 395 (1974), establishes the benchmark against which all subsequent mail fraud cases have been measured. In *Maze* the defendants used a stolen credit card to obtain food and lodging at several hotels, causing the hotels to mail invoices representing the food and services furnished to the bank that issued the credit card. This Court held that the action did not fall under mail fraud because the mailings did not further the fraudulent schemes, the scheme having been completed, having reached "fruition," before the bills were mailed. The instant case presents the same situation, except that in *Maze* the defendants used a stolen credit card to

obtain credit while here the defendant obtained credit through alleged use of oral misrepresentations. Just like Zuckerman, the defendants in *Maze* obviously knew that a delay would exist between the time they received the goods or services and the time that payment would fall due, and just like Zuckerman, the defendants in *Maze* obtained their goods before the invoices were ever mailed. Accordingly, this Court should grant certiorari so that the issue raised here can be decided in conformity with *Maze*.

The Seventh Circuit applies faulty and inconsistent reasoning in an effort to distinguish this case from *Maze*. It notes, for example, that in *Maze* the defendants would have preferred the bills never to have been mailed at all, implying that Zuckerman's alleged scheme was somehow aided by the mailed invoices. Yet just like the defendants in *Maze*, Zuckerman's scheme was jeopardized by the mailings, and Zuckerman would have preferred no mailings at all. The failure of Zuckerman to remit the balances reflected in the mailed invoices threatened to expose Zuckerman's alleged scheme, just as the mailings in *Maze* threatened the defendants' scheme when the party receiving them learned that the bills were made on stolen credit cards. Thus, Zuckerman had no more interest in inducing these mailings than did the defendants in *Maze*.

Further, the Seventh Circuit purports to distinguish *Maze* by holding that the mailings here "implemented the billing policy that made Zuckerman's scheme possible. In effect, the mailings were similar to cases where the mailings are used to lull the victim into thinking that conduct which is in fact fraudulent is actually legitimate." Memorandum op. at 6-7. Yet the mailings here, as in any credit situation, did not implement the billing policy; the billing policies existed independent from the mailings. And Zuckerman no more "lulled" Zenith into thinking his conduct was legitimate than did the defendants in *Maze* lull the hotels into thinking their conduct was legitimate when those hotels mailed bills to the bank that

issued the credit card. It is simply illogical to conclude that the defrauded party in either case could be "lulled" into nonaction because it mailed something in the ordinary course of its business.[1]

The problem with the Seventh Circuit's analysis is that it inexplicably shifts emphasis when it analyzes this case after analyzing *Maze*. The billing policy in *Maze* was implemented when the hotels accepted the stolen credit card from the defendants to purchase goods and services. Similarly, the billing policy in this case was implemented when Zenith extended credit to Zuckerman after speaking with him over the telephone. Rather than recognizing this basic similarity between the two cases, the Seventh Circuit reversed the emphasis and found that Zenith's credit policy was not implemented until Zenith placed the invoices in the mails. But if this were true, then the Seventh Circuit would interpret the *Maze* situation so that the credit policy was not implemented until the hotels placed their invoices in the mails. Therefore, acceptance of the Seventh Circuit's rationale on this point would mean that the Seventh Circuit would overrule this Court's decision in *Maze*. This Court should grant a writ of certiorari so that the law in the Seventh Circuit can be brought into conformity with *Maze*.

## C.

### The Seventh Circuit's Decision Is Inconsistent With Decisions From Other Federal Circuits That Have Considered Similar Issues.

Not surprisingly, federal courts in other jurisdictions considering similar issues have reached the opposite conclusion

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[1] Ironically, the government could have made a stronger case for "lulling" had it charged Zuckerman with mail fraud based on Zuckerman's mailing payment for the first invoice prior to his placing the last four orders. *See* Memorandum op. at 11 (Judge Fairchild, dissenting).

from that reached by the Seventh Circuit. For instance, in *United States* v. *Keenan*, 657 F. 2d 41 (4th Cir. 1981), the defendants used a fabricated purchase order purportedly from Marathon Coal Bit Co., Inc. to pick up construction material from a company called Carboloy. Carboloy, in the course of its business, mailed an invoice for this purchase to Marathon. The government charged that this mailing created an action for mail fraud. The Fourth Circuit analogized the case to *United States* v. *Maze, supra*, and held that it was not mail fraud because the mailings did not further the fraudulent scheme. *Id.*, 657 F. 2d at 43.

In the Fifth Circuit case of *United States* v. *Green*, 494 F. 2d 820 (5th Cir. 1974), *cert. denied*, 419 U. S. 1004 (1975), the defendants obtained credit cards by misrepresenting their creditworthiness. They used the credit cards to purchase tires from a gasoline station. The station mailed invoices for the purchases to the credit card company, and these mailings formed the basis for mail fraud charges. On appeal, the court held, and the government itself conceded, that the mailed invoices could not provide the basis for mail fraud.

The Seventh Circuit's decision in *Zuckerman* contradicts the opinions in *Keenan* and *Green*. In all three cases the defendants received goods on credit and the defrauded companies mailed invoices for the amounts due. The Fourth Circuit in *Keenan* and the Fifth Circuit in *Green* concluded that the mailings were too attenuated from the alleged schemes to be mail fraud. By deciding the opposite way, the Seventh Circuit is inconsistent with other federal courts. Accordingly, this Court should grant certiorari so that the proper application of mail fraud to credit transactions can be addressed once and for all.

## CONCLUSION

For the foregoing reasons, petitioner respectfully requests that a writ of certiorari be issued to review the judgments below.

Respectfully submitted,

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